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Nos. 07-984 and 07-990

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

STATE OF ALASKA

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT GOLDBELT, INC. IN SUPPORT OF PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in Goldbelt's brief in support of petitioners remains accurate.

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SUPPLEMENTAL BRIEF FOR RESPONDENT GOLDBELT, INC. IN SUPPORT OF PETITIONERS

I. ARGUMENT

Goldbelt adopts the arguments set forth in the brief filed by Coeur Alaska, Inc., and in addition submits the following:

1. Question 1. The Court Below Relied on Facts and Authorities Extraneous to the Record Supporting Goldbelt's Permit for the Cascade Point Marine Terminal

If Goldbelt correctly apprehends the first question posed by this Court's Order of May 4, 2009, it asks whether the holding in *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 646 (1990), requires that review of Coeur's 404 permit should be solely with reference to the record prepared by the Corps of Engineers under its permitting authority, leaving questions of possible violations of statutes administered by the Environmental Protection Agency to subsequent proceedings, if any, brought to enforce those statutory provisions.

Goldbelt submits that the holding of *Pension Benefit Guaranty* applies with special force to review of Goldbelt's 404 permit to construct a marine terminal at Cascade Point. Goldbelt's 404 permit is limited to placement of rock fill material in tideland waters to construct the Cascade Point dock facility, several miles distant from Lower Slate Lake, and does not itself authorize any discharge of tailings slurry. J.A. 434a-458a.

The Ninth Circuit did not bother to review or discuss the administrative record prepared by the Corps in support of Goldbelt's permit. Rather, it vacated that permit on the sole and facially erroneous assumption that the dock could not possibly serve its intended purpose of servicing the Kensington mine if Coeur Alaska's 404 permit encompassing discharge of tailings was invalidated, forcing Coeur to pursue a different method of tailings disposal for the mine to be able to proceed.

Following *Pension Benefit Guaranty*, the Ninth Circuit should have constrained its review to the question of whether issuance of the permit to Goldbelt was arbitrary, capricious or not in accordance with law based on the record applicable to that permit, leaving for future consideration whether the dock could fulfill its purpose under a mine configuration employing a method of tailings disposal other than the one it (wrongly) struck down. Instead, Goldbelt's permit fell victim to the Ninth Circuit's zeal to accommodate SEACC's request to also strike down the Goldbelt 404 permit and further frustrate and delay operation of the Kensington mine, without regard to the method of tailings disposal.

2. Question 2. Although Discharges Must Be Permitted Either As Fill or Effluent, Sections 404 and 402 Were Properly Employed In Tandem to Satisfy the Clean Water Act In This Case

The second question posed by the Court's Order asks whether a discharge that comes within the scope of both effluent regulated by the EPA and fill

regulated by the Corps may or must be permitted under both Section 402 and 404 of the Clean Water Act?

The permitting authorities administered by EPA and the Corps are mutually exclusive. That is, a discharge will be permitted either as fill under Section 404 or effluent under Section 402. Section 402 authorizes EPA to issue permits for discharge of pollutants "except as provided in section . . . 404." The legislative history of the two sections (discussed at Brief of Federal Respondents 22) and the consistent interpretation of the Clean Water Act by both EPA and the Corps confirms that the two permit systems are complementary, but mutually exclusive.

As a practical matter, the agencies have long acknowledged that fill frequently contains substances that would require a 402 permit were they not entrained in the fill material. *See* 51 Fed. Reg. 8871 and 67 Fed. Reg. 31,135, discussed at Brief of Federal Respondents 27. Congress wisely left it to the agencies to work out the definition of fill and how to address the jurisdictional overlap when fill contains materials otherwise subject to the EPA's permitting authority.

In section 404(b)(1) Congress directed EPA and the Corps to promulgate regulations to minimize the environmental impacts associated with fill disposal sites. Those regulations, known as the "404(b)(1) Guidelines" contemplate that fill materials may contain a wide range of "contaminants," 40 C.F.R. § 230.60, and provide that the effects of these contaminants on the environment may be minimized by conditioning the 404 permit in a variety of ways, including choice of disposal area, treatment,

dispersion, and control following discharge. 40 C.F.R. Part 230, Subpart H. A number of these methods have been employed in the design and conditions applicable to the Kensington tailings storage facility. Only fill containing contaminants that would violate an applicable "toxic effluent standard or prohibition under Section 307 of the Act" is categorically excluded from permitting under Section 404. 40 C.F.R. § 230.10(b)(2).[1]

Although the Sections 402 and 404 permitting authorities are mutually exclusive, they can be employed in tandem to insure that materials permitted as fill do not result in violation of water quality standards or release of potentially harmful effluent beyond the immediate zone of deposition. This staged treatment of permit requirements for fill and effluent is reflected in Alaska's certification pursuant to Section 401 of the Clean Water Act that the discharges into and out of Lower Slate Lake will not violate State water quality standards.

Alaska's certification (J.A. 258a-265a) authorizes the tailings impoundment facility as a 404 specified disposal site and a "treatment work" under State law, within which water quality standards do not apply as long as discharges from the treatment work

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[1] A list of substances deemed to be "toxic pollutants" is maintained by the Administrator of the EPA. 40 C.F.R. § 401.15. Plaintiffs have not argued – nor could they – that the relatively benign materials entrained in the Kensington tailings violate any toxic effluent standard, nor do they dispute that the 402 permit that will be issued for discharges from the Lower Slate Lake impoundment will insure that any discharge satisfies effluent limits and state water quality standards.

are controlled by an NPDES permit from EPA to insure compliance with effluent limits and water quality standards. J.A. 258a-259a. The EPA did just that, issuing a 402 NPDES permit for the limited amount of water discharged from the impoundment that is not recycled, requiring adherence to applicable effluent limits and standards. J.A. 317a-331a. The Corps and EPA agreed with the State on application of 301 and 306 effluent limits and State water quality standards to discharges from the impoundment, while regulating the discharge into the impoundment under 404, as a specified disposal site. J.A. 144a-145a, 146a-149a. The plaintiffs have not challenged the State's 401 certification or the 402 permit

Thus, while the permitting systems under sections 402 and 404 are mutually exclusive for a particular discharge, they may be employed in tandem to regulate an overall project. In the case of the Kensington mine, both permitting systems were applied to insure that any "effluent" entrained in the tailings discharged into the Lower Slate Lake impoundment as "fill" will be controlled in the terms of the NPDES permit required for discharges from the impoundment. This common sense approach was developed after extensive discussions between the Corps and EPA, and should not be disturbed, particularly given the absence of a clear statutory mandate requiring a different approach and the plaintiffs' limited challenge to the 404 permit for the discharge of tailings slurry into the impoundment.

3. The Ninth Circuit's Flawed Construction of the Clean Water Act Is Having a Devastating Impact on Natives in Southeast Alaska

During its construction – which was nearly complete before the Ninth Circuit issued its injunction – the Kensington Mine provided more than 300 high paying jobs (J.A. 504a) in a region suffering a long-term decline in the number of traditional jobs in the timber and fishing industries. The current economic downturn has been particularly devastating for Alaska Natives. Coeur Alaska, with its Native friendly employment policies, had provided Goldbelt's shareholders with employment, contracting opportunities, as well as training for future jobs in the mining industry. Goldbelt's marine terminal, which stands half completed, represented the first opportunity of Juneau area Tlingits to develop the lands Congress awarded them more than a quarter century ago as compensation for their aboriginal claims in the Berners Bay area.

The Ninth Circuit's action has stopped a mostly constructed, environmentally sound economic development project in its tracks, with profoundly devastating impacts to Alaska Native enterprises and families. This unwarranted reinterpretation by the Ninth Circuit of the established sound Clean Water Act permitting regime, relied upon not only by Coeur Alaska but the Alaska Native and other communities and citizens of the State, falls with particular harsh unfairness during the current dire economic times, and is a particular insult and setback to Goldbelt's federal law land entitlement.

II. CONCLUSION

The adequacy of the record made by the Corps of Engineers with respect to Goldbelt's marine terminal has not been questioned by either the plaintiffs or the Ninth Circuit. The decision to vacate Goldbelt's permit was based solely on speculation that the dock could not fulfill its purpose of servicing the mine if Coeur were forced to pursue a different method of tailings disposal. In so doing, the Ninth Circuit, contrary to the teaching of *Pension Benefit Guaranty*, impermissibly based its decision on matters outside the record supporting permit issuance and anticipated a future violation that in all probability would never occur.

The record compiled by the Corps of Engineers in support of the 404 permit issued to Coeur for the Lower Slate Lake tailings storage facility reflects years of testing and analysis demonstrating the environmental soundness of the projects. The agencies' carefully considered two-stage approach to permitting the tailings impoundment insures that water quality protection will be upheld and the regulatory jurisdiction of both the Corps and EPA will be exercised as intended under the Clean Water Act.

For the foregoing reasons, Goldbelt respectfully requests that the decision of the Ninth Circuit Court of Appeals be reversed as to all parties, including Goldbelt.

Respectfully submitted.

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May 15, 2009